

Affin Bank Bhd v Successcom Enterprise Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-02-520
OF 2006, J-02-521 OF 2006 AND J-03-90 OF 2006
ZALEHA ZAHARI, ZULKEFLI AND HASAN LAH JJCA
22 SEPTEMBER 2008

B

Banking Law — Cheque — Payment of cheque — Crossings on cheque — 'Account payee crossing' — Whether s 85 of the Bills of Exchange Act 1949 provides statutory defence to collecting bank — Whether collecting bank acted in good faith — Whether collecting bank was negligent — Whether plaintiff true owner of remaining cheques

C

Civil Procedure — Judgment and orders — Judgment upon admission of fact — Appeal against — Whether there was unequivocal admission of fact by defendant — Whether there were issues to be tried — Whether there was defence to action

D

Civil Procedure — Summary judgment — Appeal — Whether there were triable issues as to whether plaintiff entitled to entire judgment sum

E

Evidence — Fresh or further evidence — Application to adduce — Whether High Court judge had erred in fact and law in failing to appreciate that fresh evidence would have determining influence on decision in application for summary judgment

F

G

The plaintiff company filed an action against the defendant bank claiming RM30,264,256.18 for conversion of 2,150 cheques or alternatively for money had and received. The plaintiff then filed an application for summary judgment (summary judgment application) for RM20,000,423.25 as damages for conversion of 1,366 cheques or for money had and received. At the hearing of the summary judgment application the defendant applied for an adjournment to take instructions from the defendant on the averments raised in the plaintiff's affidavit but the plaintiff opposed this application for an adjournment. The deputy registrar proceeded with the hearing of the summary judgment application and allowed summary judgment to be entered against the defendant bank. The defendant thereafter filed an appeal against the deputy registrar's refusal to allow an adjournment and the judgment entered against the defendant. In the meantime the plaintiff filed an application for leave to enter judgment for the remaining 784 cheques in

H

I

- A the sum of RM10,263,832.93 under O 27 r 3 of the Rules of the High Court 1980 ('RHC') ('the O 27 application'). At the same time the defendant bank filed an application for leave to adduce fresh evidence for the hearing of the summary judgment appeal. This fresh evidence consisted of two affidavits ie
- B a second affidavit by the defendant bank and an affidavit by a third party customer of the defendant, United Refrigerator Trading Sdn Bhd ('URT'). The appeal against the summary judgment, the O 27 application and the application for leave to adduce fresh evidence were heard before the High Court on the same day. The High Court judge dismissed the appeal against the summary judgment and the application for leave to adduce fresh evidence
- C but allowed the plaintiff's O 27 application. This was the defendant bank's appeal against all three orders. The defendant bank submitted that the High Court had erred when it refused the defendant's application to adduce fresh evidence because the bank had satisfied the criteria for the admission of this new evidence, which if true, would have had a determining influence upon
- D the decision of the registrar. The defendant bank further submitted that the defendant's second affidavit and URT's affidavit (the new evidence) would have a determining influence on two matters ie whether there were issues of fact and/or law to be tried in respect of the plaintiff's claim; and whether
- E there were some other reasons for a trial of the plaintiff's claim. It was the plaintiff's contention for all the three appeal cases that the combined effect of s 81A when read together with s 8(1) of the Bills of Exchange Act 1949 ('the Act') constituted a clear and absolute statutory bar to a collecting bank to crediting a cheque crossed 'account payee' into the account of any party other
- F than the named payee.

Held, allowing all three appeals cases with costs:

- G (1) The High Court erred in fact and in law by failing to appreciate that the defendant had exercised reasonable diligence to obtain the new evidence contained in the defendant's second affidavit and URT's affidavit. Since the plaintiff had denied that there was any agreement between the plaintiff and URT that the cheques would be paid into URT's account
- H it became necessary for the defendant to adduce evidence to contradict the plaintiff's denial (see para 6).
- I (2) The defendant had 14 days from the date of service of the plaintiff's affidavit to file and serve an affidavit in reply under O 32 r 13(2) of the RHC. As such on the date of the hearing of the application for summary judgment the defendant still had time to file and serve an affidavit in reply to the plaintiff's affidavit. In addition the defendant was compelled to oppose the application for summary judgment when the factual averments contained in the plaintiff's affidavit stood

- unrebutted. In the circumstances the deputy registrar's decision to decline the adjournment was a wrongful exercise of discretion (see para 7). A
- (3) If the new evidence was submitted during the hearing of the application for summary judgment it would have a determining influence on whether the plaintiff was entitled to the entire judgment sum that the plaintiff applied for in the application for summary judgment and if not the actual amount due and payable by the defendant to the plaintiff consequent to the reduction (see paras 10 & 12). B
- (4) If the new evidence were brought to the attention of the deputy registrar, the evidence would have a determining influence on the triable issues as to whether the plaintiff was estopped from contending that there was an agreement between the plaintiff and URT that the cheques would be paid into URT's account and if so whether the plaintiff was estopped from alleging that the defendant was liable in conversion or for money had and received (see para 12). C D
- (5) The fact that a cheque had been crossed in accordance with s 81A of the Act did not necessarily preclude the defendant from relying on s 85 of the Act as a defence. Section 85 of the Act provides a statutory defence to collecting banks in respect of a claim made by true owners of cheques, whether brought in conversion or for money had and received. As the new evidence showed that there was an agreement between the plaintiff and URT that the cheques would be paid into URT's account such evidence would have had a determining influence on whether the defendant bank acted in good faith and was not negligent in collecting the cheques on behalf of URT. If the defendant acted in good faith and was not negligent, the defendant was entitled to rely on the statutory defence under s 85 of the Act. In the circumstances the judge of the High Court erred by failing to appreciate that the new evidence would have a determining influence on whether there were some other reasons for a trial of the plaintiff's claim (see paras 17 & 29). E F G
- (6) There were a number of circumstances based on the new evidence adduced that warrant a trial of the plaintiff's claim. As the defendant had shown that there were circumstances that ought to be inquired into, summary judgment should not be allowed (see para 17). H
- (7) The court will only allow judgment to be entered under O 27 r 3 of the RHC if there was an unequivocal admission of fact which entitled the plaintiff to enter judgment against the defendant. If liability turns on a question of law or mixed fact and law, judgment cannot be obtained. As such, if a plaintiff cannot show that all the components of his cause of action had been admitted, the plaintiff is not entitled to judgment under O 27 r 3 of the RHC. The court will not exercise its discretion I

- A to allow judgment to be entered under O 27 r 3 of the RHC if there are issued to be tried or there is a defence to the action. In the present case, the plaintiff applied for judgment to be entered against the defendant based on the admission that the defendant bank had collected and paid the monies under the remaining cheques into URT's
- B account but there was no admission that the true owner of the remaining cheques was the plaintiff. In fact in the present case, the plaintiff did not plead that it was the true owner of the remaining cheques or even exhibited the remaining cheques in support of the O
- C 27 application. As such, the defendant's admission that the remaining cheques had been paid into URT's account was insufficient for the judge to enter judgment against the defendant (see paras 21 & 23).
- (8) Since the plaintiff's cause of action was either in conversion or money had and received, the plaintiff ought to have elected one of the causes
- D of action at the latest before applying for judgment to be entered against the defendant. The plaintiff did not however make such an election. The election was important in determining whether the plaintiff could have obtained judgment based on conversion and whether the defendant was entitled to rely on the defence of contributory negligence
- E against the plaintiff's claim in conversion (see para 24).
- (9) There were also triable issues such as whether the plaintiff was entitled to the entire judgment sum and if not the actual amount, then by how
- F much the amount should be reduced; and as to whether the defendant was entitled to rely on the defence of estoppel against the plaintiff's claim in conversion or money had and received (see para 26).

[Bahasa Malaysia summary]

- G Syarikat plaintif telah memfailkan tindakan terhadap bank defendan dengan menuntut RM30,264,256.18 untuk konversi 2,150 cek atau secara alternatif untuk wang yang dimiliki dan diterima. Plaintif kemudiannya telah memfailkan permohonan untuk penghakiman terus ('permohonan penghakiman terus') sebanyak RM20,000,423.25 sebagai ganti rugi untuk
- H konversi bagi 1,366 cek atau untuk wang yang dimiliki dan diterima. Ketika pendengaran permohonan penghakiman terus, defendan telah memohon untuk satu penangguhan bagi mendapatkan arahan daripada defendan atas penegasan-penegasan yang telah dibangkitkan di dalam afidavit plaintif tetapi plaintif telah menentang permohonan untuk penangguhan tersebut.
- I Timbalan pendaftar telah meneruskan dengan pendengaran permohonan penghakiman terus tersebut dan telah membenarkan penghakiman terus dimasukkan terhadap bank defendan. Defendan kemudiannya telah memfailkan rayuan terhadap penolakan timbalan pendaftar untuk membenarkan penangguhan dan penghakiman yang telah dimasukkan

terhadap defendan. Sementara itu, plaintif telah memfailkan permohonan bagi kebenaran untuk memasukkan penghakiman terhadap baki 784 cek yang berjumlah RM10,263,832.93 di bawah A 27 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') ('permohonan A 27'). Pada masa yang sama bank defendan telah memfailkan permohonan bagi kebenaran untuk mengemukakan keterangan baru bagi pendengaran rayuan penghakiman terus. Keterangan baru tersebut terdiri daripada dua affidavit iaitu, affidavit kedua oleh bank defendan dan affidavit oleh pihak ketiga pelanggan defendan, United Refrigerator Trading Sdn Bhd ('URT'). Rayuan terhadap penghakiman terus, permohonan A 27 dan permohonan bagi kebenaran untuk mengemukakan keterangan baru didengar di hadapan Mahkamah Tinggi pada hari yang sama. Hakim Mahkamah Tinggi telah menolak rayuan terhadap penghakiman terus dan permohonan bagi kebenaran untuk mengemukakan keterangan baru tetapi telah membenarkan permohonan A 27 plaintif. Ini adalah rayuan bank defendan terhadap kesemua tiga perintah tersebut. Bank defendan menghujahkan bahawa Mahkamah Tinggi telah terkhilaf apabila ia menolak permohonan defendan untuk mengemukakan keterangan baru kerana bank telah memenuhi kriteria bagi penerimaan keterangan baru tersebut, yang mana jika benar, ianya mempunyai pengaruh penentu terhadap keputusan pendaftar. Bank defendan selanjutnya menghujahkan bahawa affidavit kedua defendan dan affidavit URT ('keterangan baru') mempunyai pengaruh penentu atas dua perkara iaitu, sama ada terdapat isu-isu fakta dan/atau undang-undang untuk dibicarakan yang berkaitan dengan tuntutan plaintif; dan sama ada terdapat alasan-alasan yang lain untuk dibicarakan terhadap tuntutan plaintif. Adalah penegasan plaintif untuk kesemua ketiga-tiga kes rayuan bahawa kesan gabungan s 81A apabila dibaca bersama dengan s 8(1) Akta Pertukaran Bil 1949 ('Akta') menjadikan satu yang jelas dan halangan statutori yang mutlak kepada bank pengumpul untuk mengkreditkan cek berpaling kepada akaun pihak lain selain penerima yang telah dinamakan.

A

B

C

D

E

F

G

Diputuskan, membenarkan ketiga-tiga rayuan dengan kos:

- (1) Mahkamah Tinggi telah terkhilaf dalam fakta dan undang-undang dengan gagal menghargai bahawa defendan telah melaksanakan usaha yang munasabah untuk mendapatkan keterangan baru yang terkandung di dalam affidavit kedua defendan dan affidavit URT. Memandangkan plaintif telah menafikan bahawa terdapat mana-mana perjanjian di antara plaintif dengan URT bahawa cek-cek hendaklah dibayar ke dalam akaun URT ianya menjadi penting untuk defendan mengemukakan keterangan untuk menentang penafian plaintif (lihat perenggan 6).
- (2) Defendan mempunyai 14 hari dari tarikh penyampaian affidavit plaintif

H

I

- A untuk memfailkan dan menyerahkan affidavit balasan di bawah A 32 k 13(2) KMT. Oleh itu, pada tarikh pendengaran permohonan penghakiman terus defendan masih mempunyai masa untuk memfailkan dan menyerahkan affidavit balasan kepada affidavit plaintif. Sebagai tambahan, defendan terpaksa menentang penghakiman terus apabila penegasan fakta yang terkandung di dalam affidavit plaintif tidak dipatahkan. Dalam keadaan tersebut keputusan timbalan pendaftar untuk menolak penangguhan adalah kesilapan dalam melaksanakan budi bicara (lihat perenggan 7).
- B
- C (3) Jika keterangan baru telah diujahkan ketika pendengaran permohonan penghakiman terus, ianya berkemungkinan memiliki pengaruh penentu berkenaan dengan sama ada plaintif adalah berhak kepada keseluruhan jumlah penghakiman yang plaintif pohon di dalam permohonan penghakiman terus dan jika tidak jumlah sebenar yang tertunggak dan perlu dibayar oleh defendan kepada plaintif akibat daripada pengurangan (lihat perenggan 10 & 12).
- D
- E (4) Jika keterangan baru dibawa kepada perhatian timbalan pendaftar, keterangan tersebut berkemungkinan memiliki pengaruh penentu terhadap isu-isu yang boleh dibicarakan berkenaan dengan sama ada plaintif adalah diestop daripada menegaskan bahawa terdapat perjanjian di antara plaintif dengan URT bahawa cek-cek hendaklah dibayar ke dalam akaun URT dan jika benar, sama ada plaintif adalah diestop daripada mendakwa bahawa defendan adalah bertanggungjawab dalam konversi atau wang yang dimiliki dan diterima (lihat perenggan 12).
- F
- G (5) Fakta bahawa cek yang dipalang menurut s 81A Akta tidak semestinya menghalang defendan daripada bergantung kepada s 85 Akta sebagai pembelaan. Seksyen 85 Akta memperuntukkan pembelaan statutori kepada bank pemungut berkenaan dengan tuntutan yang dibuat oleh pemilik sebenar cek, sama ada dibawa sebagai konversi atau untuk wang yang dimiliki dan diterima. Oleh kerana keterangan baru menunjukkan bahawa terdapat perjanjian di antara plaintif dan URT bahawa cek-cek hendaklah dibayar ke dalam akaun URT, keterangan tersebut mempunyai pengaruh penentu berkenaan dengan sama ada bank defendan bertindak secara suci hati dan tidak cuai dalam memungut cek-cek bagi pihak URT. Jika defendan bertindak secara suci hati dan tidak cuai, defendan adalah berhak untuk bergantung kepada pembelaan statutori di bawah s 85 Akta. Dalam keadaan ini, hakim Mahkamah Tinggi telah terkhilaf dengan gagal untuk menghargai keterangan baru yang berkemungkinan mempunyai pengaruh penentu berkenaan dengan sama ada terdapat sebab-sebab yang lain untuk satu perbicaraan tuntutan plaintif (lihat perenggan 17 & 29).
- H
- I (6) Terdapat beberapa keadaan berdasarkan keterangan baru yang dikemukakan yang mewajarkan perbicaraan tuntutan plaintif. Oleh

- kerana defendan telah menunjukkan bahawa terdapat keadaan yang perlu dipersoalkan, penghakiman terus tidak seharusnya dibenarkan (lihat perenggan 17). A
- (7) Mahkamah akan hanya membenarkan penghakiman dimasukkan di bawah A 27 k 3 KMT jika terdapat penerimaan fakta yang jelas yang memberikan plaintif hak untuk memasukkan penghakiman terhadap defendan. Jika liabiliti berkisarkan persoalan undang-undang atau campuran fakta dan undang-undang, penghakiman tidak boleh diperolehi. Oleh itu, jika plaintif tidak boleh menunjukkan kesemua komponen kausa tindakannya telah diterima, plaintif tidak berhak kepada penghakiman di bawah A 27 k 3 KMT. Mahkamah tidak akan melaksanakan budi bicaranya untuk membenarkan penghakiman dimasukkan di bawah A 27 k 3 KMT jika terdapat isu untuk dibicarakan atau terdapat pembelaan terhadap tindakan tersebut. Dalam kes ini, plaintif telah memohon untuk penghakiman untuk dimasukkan berdasarkan kepada penerimaan bahawa bank defendan telah memungut dan membayar wang di bawah baki cek ke dalam akaun URT tetapi tidak terdapat penerimaan bahawa pemilik sebenar baki cek adalah plaintif. Oleh itu dalam kes ini, plaintif tidak memplidkan bahawa ianya adalah pemilik sebenar baki cek atau mengekshibitkan baki cek dalam menyokong permohonan A 27. Oleh yang demikian, penerimaan defendan bahawa baki cek telah dibayar ke dalam akaun URT adalah tidak mencukupi bagi hakim untuk memasukkan penghakiman terhadap defendan (lihat perenggan 21 & 23). B C D E
- (8) Memandangkan, kausa tindakan plaintif adalah sama ada konversi atau wang yang dimiliki dan diterima, plaintif perlu memilih untuk satu kausa tindakan selewat-lewatnya sebelum memohon untuk penghakiman dimasukkan terhadap defendan. Walau bagaimanapun, plaintif tidak melakukan pemilihan tersebut. Pemilihan adalah penting dalam menentukan sama ada plaintif boleh memperolehi penghakiman berdasarkan kepada konversi dan sama ada defendan adalah berhak untuk bergantung kepada pembelaan kecuaiian sertaan terhadap tuntutan plaintif dalam konversi (lihat perenggan 24). F G
- (9) Terdapat juga isu yang boleh dibicarakan seperti sama ada plaintif berhak kepada keseluruhan jumlah penghakiman dan jika bukan jumlah sebenar, berapa banyak jumlah yang sepatutnya dikurangkan; dan berkenaan dengan sama ada defendan berhak untuk bergantung kepada pembelaan estoppel terhadap tuntutan plaintif dalam konversi atau wang yang dimiliki dan diterima (lihat perenggan 26). H I

Notes

For cases on appeal against summary judgment, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6883–7049.

- A For cases on application to adduce fresh or further evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1552–1554.
For cases on judgment upon admission of fact, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4168–4169.
For cases on payment of cheque, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2044–2046.
- B

Cases referred to

- AL Underwood Ltd v Bank of Liverpool and Matins* [1924] 1 KB 775, CA (refd)
- C *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956, CA (refd)
Perwira Habib Bank (M) Bhd v Hj Abdullah Hj Sulaiman & Anor [1985] 2 CLJ 489; [1985] CLJ 639 (Rep), HC (refd)
United Australia Ltd v Barclays Bank Ltd [1941] AC 1, HL (refd)
United Malayan Banking Corp Bhd v Kek Tek Huat (deceased) (Kik Chon Lam & Ors, Executors of the estate of Kek Tek Huat) [1990] 1 MLJ 83, SC (refd)
- D *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657, FC (refd)
Wright Kirke v North, Re [1895] 2 Ch 747, SC (folld)
- E *Zanda Investment Ltd v Bank of America National Trust and Savings Association & Ors* [1994] 2 HKC 409, HC (refd)

Legislation referred to

- Bills of Exchange Act 1949 ss 8(1), 81A, 85, 85(2)(a), 95
Civil Law Act 1956 s 12
- F Rules of the High Court 1980 O 14 r 1, O 27 r 3, O 56 r 1(3A)

Appeal from: Civil Suit No MT3–22–530 of 2005 (High Court, Johor Bahru)

- G *DP Naban (Andrew Chiew and LB Loh with him) (Lee Hishammuddin Allen & Gledhill) for the appellant.*
M Patmanathan (C Kumareson and R Vasanthan with him) (Julie Lim, Vasanthan & Co) for the respondent.

- H **Zulkefli JCA:**

INTRODUCTION

- I [1] These are three related appeal cases fixed for hearing before us arising from the decision of the learned judge of the High Court at Johor Bahru. The first appeal case No J-02–521 of 2006 is in respect of the defendant's appeal against the decision of the learned judge given on 23 May 2006 in dismissing the defendant's application to adduce fresh evidence for the hearing of an

appeal against a summary judgment entered against the defendant on 10 March 2006 ('order dated 23 May 2006'). The second appeal case No J-03-90 of 2006 is in respect of the defendant's appeal against the decision of the learned judge in affirming the summary judgment entered against the defendant on 10 March 2006. The third appeal case No J-02-520 of 2006 is in respect of the defendant's appeal against the decision of the learned judge given on 23 May 2006 in allowing the plaintiff's application to enter judgment based on admission of facts under O 27 r 3 of the Rules of the High Court 1980 ('RHC') ('judgment dated 23 May 2006').

BACKGROUND FACTS AND CHRONOLOGY OF EVENTS

[2] The relevant background facts and the chronology of events leading to the present three appeal cases by the defendant are as follows:

- (1) On 1 August 2005 the plaintiff filed a writ action against the defendant for conversion of 2,150 cheques. Alternatively, the plaintiff's action was for money had and received. The plaintiff's claim was for RM30,264,256.18 as damages for conversion or money had and received.
- (2) On 9 February 2006 the plaintiff filed and served an application for summary judgment for RM20,000,423.25 as damages for conversion of 1,366 cheques ('cheques') or for money had and received ('summary judgment application'). The summary judgment application was fixed for hearing on 10 March 2006.
- (3) On 6 March 2006 the defendant filed and served an affidavit in reply to oppose the summary judgment application ('defendant's affidavit').
- (4) On 7 March 2006 the plaintiff filed and served an affidavit in reply to the defendant's affidavit ('plaintiff's affidavit').
- (5) On 10 March 2006 at the hearing of the summary judgment application before the deputy registrar, the defendant's counsel applied for an adjournment in order to take instructions from the defendant on the averments made in the plaintiff's affidavit. The plaintiff's counsel opposed the application for adjournment. The deputy registrar declined the adjournment. The deputy registrar proceeded with the hearing of the summary judgment application. The deputy registrar allowed the summary judgment application against the defendant ('judgment dated 10 March 2006').
- (6) On 10 March 2006 the defendant filed a notice of appeal to judge in chambers against the judgment dated 10 March 2006 ('summary judgment appeal'). The defendant appealed against the following:
 - (a) refusal to allow an adjournment; and

- A (b) allowing the judgment dated 10 March 2006.
- (7) On 15 March 2006 the plaintiff subsequently filed an application for judgment for the balance of the 784 cheques ('the remaining cheques') to be entered against the defendant in sum of RM10,263,832.93 under O 27 r 3 of the RHC ('O 27 application').
- B (8) On 31 March 2006 the defendant filed an application for leave to adduce fresh evidence for the hearing of the summary judgment appeal ('fresh evidence application'). The defendant applied for leave adduce two affidavits, namely:
- C (a) the defendant's affidavit affirmed by Low Soon Hock on 14 March 2006 ('defendant's second affidavit'); and
- (b) the affidavit filed by one third party customer of the defendant, United Refrigerator Trading Sdn Bhd ('URT') and affirmed by a director of URT, Lim Jeng Hong on 21 March 2006 ('URT's affidavit').
- D (9) On 23 May 2006 the High Court judge heard the summary judgment appeal, the O 27 application and the fresh evidence application. The High Court judge ordered that:
- E (a) the summary judgment appeal to be dismissed.
- (b) The O 27 application to be allowed and the plaintiff was granted leave to enter judgment in the sum of RM10,263,832.93 against the defendant; and
- F (c) The fresh evidence application to be dismissed.
- (10) On 24 May 2006 the defendant lodged an appeal against all the above three orders made by the learned judge of the High Court.

G

DECISION OF THE COURT ON APPEAL

- [3] We heard the three appeal cases and delivered our oral decision on 6 April 2007. We now give our reasons in arriving at our decisions.

H

- [4] We shall first deal with the appeal by the defendant against the order of dismissal of the High Court in respect of the dismissal of the defendant's fresh evidence application as in appeal case No J-02-521 of 2006. The fresh evidence application was made under O 56 r 1(3A) of the RHC. In such an application, the applicant is required to satisfy the following criteria:

I

- (a) at the hearing before the registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

- (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the registrar. A

[5] We are also of the view since the fresh evidence application was filed for the hearing of the defendant's appeal against the summary judgment obtained pursuant to O 14 r 1 of the RHC, the court should consider whether the evidence in the defendant's second affidavit and URT's affidavit would have a determining influence on two matters: B

- (a) whether there are issue of fact and/or law to be tried in respect of the plaintiff's claim; and C
- (b) whether there are some other reasons for a trial of the plaintiff's claim (see the case of *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657). D

[6] In this case we find that the learned judge of the High Court erred in fact and in law by failing to appreciate that the defendant have exercised reasonable diligence to obtain the evidence contained in the defendant's second affidavit and URT's affidavit. This is evidenced by the following sequence of events: E

- (a) in the plaintiff's affidavit, the plaintiff denied that there was any agreement between the plaintiff and URT that the cheques will be paid into URT's account. As such, it became necessary for the defendant to adduce evidence to contradict the plaintiff's denial; F
- (b) the plaintiff's affidavit was served on the defendant's former solicitors, Messrs Azzat & Izzat on 7 March 2006. The summary judgment application was fixed for hearing on 10 March 2006; G
- (c) Messrs Azzat & Izzat needed time to prepare an affidavit to be affirmed by the officer for the defendant and the director of URT. In this regard, it is to be noted that the defendant's former solicitors, Messrs Azzat & Izzat were based in Kuala Lumpur. The deponents of the defendant's second affidavit and URT affidavit were both based on Johor; H
- (d) In the circumstances of the case, Messrs Azzat & Izzat had to contact the plaintiff's solicitors as to whether they were agreeable to adjourne the hearing of the summary judgment application on 10 March 2006 in order for the defendant to file an affidavit in reply to the plaintiff's affidavit. The plaintiff's solicitors were not agreeable to the adjournment; I
- (e) Messrs Azzat & Izzat then wrote to the deputy registrar of an adjournment. Messrs Azzat & Izzat did not receive any reply;
- (f) On 10 March 2006, the defendant's counsel attended court to apply for

A an adjournment of the hearing of the summary judgment application. The plaintiff objected to the application.

B [7] It is our considered view that the deputy registrar's decision was a wrongful exercise of discretion because the plaintiff's affidavit contained substantive averments of fact, in particular the plaintiff's denial that there was an agreement between the plaintiff and URT that the cheques will be paid into URT's account. We also find the defendant has 14 days from the date of service of the plaintiff's affidavit to file and serve an affidavit in reply under C O 32 r 13(2) of the RHC. On 10 March 2006, the defendant still had time to file and serve an affidavit in reply to the plaintiff's affidavit. The defendant was therefore compelled therein to oppose the summary judgment application on 10 March 2006 when the factual averments contained in the plaintiff's affidavit stand unrebutted.

D [8] We also find the monies collected by the defendant and paid over to URT were to settle debts due and owing by the plaintiff to URT. This can be seen from a comparison of some of the cheques and the entries made in E URT's monthly general ledger which show that the debts owed by the plaintiff has been reduced in accordance with the value of the said cheques. Some of the examples are set out as follows:

		Cheque No	Amount (RM)	Date of Cheque	Date of Entry on General Ledger
F	(a)	AMBB 356877	2,487.50	12 July 2002	July 2002
	(b)	AMBB 370966	5,789.00	13 September 2002	September 2002
G	(c)	RHB 451807	4,272.00	7 August 2002	August 2002
	(d)	RHB 464762	2,980.00	14 August 2002	August 2002

H [9] We take the view assuming the defendant is in fact liable, the amount payable to the plaintiff will be accordingly reduced because the plaintiff's debts to URT have been accordingly reduced. We also noted that in URT's affidavit, the director of URT, Lim Jeng Hong had explained in detail that the cheques were used to settle the debts due and owing by the plaintiff to URT. I These debts arose from the goods sold by URT to the plaintiff.

[10] It is our judgment if the defendant's second affidavit and URT's affidavit were admitted during the hearing of summary judgment application; it would have a determining influence on whether the plaintiff is entitled to

the entire judgment sum that the plaintiff applied for in the summary judgment application and if not, what is the actual amount due and payable by the defendant to the plaintiff consequent to the reduction.

A

[11] We are also of the view that it is a triable issue as to whether the defendant is entitled to rely on the defence of estoppel against the plaintiff's claim in conversion or money had and received. We find that the plaintiff have by its own conduct represented to the defendant that the plaintiff had no objection to the defendant collecting the cheques and paying the proceeds thereof into URT's account. On this point we find that the plaintiff did not make any protest whatsoever in respect of the cheques that were paid into URT's account between 1999 and 2005. The plaintiff had only protested and made a demand in 2005.

B

C

[12] The defendant has alleged there was an agreement between the plaintiff and URT that the cheques will be paid into URT's account. In the plaintiff's affidavit, the plaintiff however, has denied that there was such an agreement. We find the defendant's second affidavit and URT's affidavit contained substantial evidence relating to whether there was such an agreement between the plaintiff and URT. If the evidence contained in the defendant's second affidavit and URT's affidavit were brought to the attention of the deputy registrar, the evidence would have a determining influence on the following triable issues:

D

E

- (a) whether the plaintiff is estopped from contending that there was an agreement between the plaintiff and URT that the cheques will be paid into URT's account; and
- (b) if so, whether the plaintiff is estopped from alleging that the defendant is liable in conversion or for money had and received.

F

G

[13] Learned counsel for the plaintiff in his argument before us vigorously submitted for all the three appeal cases by the defendant that in law a cheque that is crossed 'account payee' or 'a/c payee' with or without the word 'only' is not transferable/negotiable and can only be credited into the account of the named payee. This is mandatorily provided for by s 81A of the Bills of Exchange Act 1949 ('the Act'). It is the plaintiff's case that all the cheques have been drawn in favour of the plaintiff on an 'account payee' basis. It was submitted for the plaintiff that s 81A of the Act was introduced by amendment in Parliament to make cheques cross 'account payee' absolutely non-transferable even if there is an indorsement on the cheque. The plaintiff further relied on s 8(1) of the Act which provides as follows:

H

I

When a bill contains words prohibiting transfer, or indicating that it should be transferable, it is valid as between the parties thereto, but is not negotiable.

A [14] It is the plaintiff's contention that the combined effect of s 81A when
read together with s 8(1) of the Act constitutes a clear and absolute statutory
bar or prohibition to a collecting bank to crediting a cheque crossed 'account
payee' into the account of any party other than the named payee. The
B plaintiff contended that the defendant repeated harping that there has to be
a trial of the action to determine if the plaintiff is the true owner of the
cheques is baseless and unfounded. To the plaintiff it has no application in
the context of cheque marked 'a/c payee' because the law only recognises the
named payee. Crossed cheques belong to a special category which is an
C exception because a crossed cheque is not negotiable and the issue of 'true
owner' and 'right to immediate possession' do not arise in so far as cross
cheques are concerned.

D [15] With respect to the above contention of the plaintiff we are of the view
that the defendant is not precluded from relying on s 85 of the Act as a
defence to the plaintiff's claim. Section 85 provides a statutory defence to
collecting banks in respect of claim made by true owners of cheques, whether
brought in conversion or for money had and received. Section 85 of the Act
relieves a collecting bank from liability provided that the bank discharges its
E burden in proving that the bank had acted in good faith and without
negligence. In determining good faith, s 95 of the Act stipulates that a thing
is deemed to be done in good faith where it is in fact done honestly whether
it is done negligently or not. In order to establish that the defendant was not
negligent, the defendant needs to establish that the defendant has taken
F reasonable care to refrain from taking any such step which the defendant
foresees is, or ought reasonably to have foreseen was, likely to cause loss or
damage to the true owner.

G [16] It is our view that based on s 85 of the Act the fact that a cheque has
been crossed in accordance with s 81A of the Act does not necessarily
preclude the defendant from claiming this defence. This is clearly provided
under s 85(2)(a) of the Act. As stated earlier, the defendant's second affidavit
and URT's affidavit contained evidence to show that there was an agreement
between the plaintiff and URT that the cheques will be paid into URT's
H account. If the deputy registrar had considered the evidence in the affidavits,
the affidavits would have a determining influence on whether the defendant
acted in good faith and was not negligent in collecting the cheques on behalf
of URT. If the defendant acted in good faith and was not negligent, the
defendant was entitled to rely on the statutory defence under s 85 of the Act.

I [17] It is also our considered view that the learned judge of the High Court
erred by failing to appreciate that the defendant's second affidavit and URT's
affidavit would have a determining influence on whether there are some other
reasons for a trial of the plaintiff's claim. In this regard we would refer to the

case of *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 2 MLJ 657 wherein the Federal Court, inter alia, held that if the defendant cannot point to a specific issue which ought to be tried but the defendant nevertheless satisfies the court that there are circumstances that ought to be inquired into, summary judgment will not be allowed.

A

B

[18] Based on the reasons above stated we allowed the defendant's appeal in appeal No J-02-521 of 2006 under which the defendant's fresh evidence application should have been allowed.

C

[19] We would now deal with the defendant's appeal in appeal No J-03-90 of 2006. Having allowed the defendant's fresh evidence application under appeal No J-02-521 of 2006, it would become apparent that we have to allow the defendant's appeal against the decision of the learned judge in affirming the summary judgment entered against the defendant on 10 March 2006.

D

[20] It is our judgment that there are a number of circumstances based on the fresh evidence adduced that it warrants a trial of the plaintiff's claim as follows:

E

- (a) the absence of any explanation as to who made the indorsements 'For the credit of United Refrigerators Trading Sdn Bhd' on the cheques and when the cheques were crossed 'Account payees only';
- (b) the disputed fact as to where there is an agreement between the plaintiff and URT that the cheques will be paid into URT's account arising from the closed business relationship between the plaintiff and URT before 2004;
- (c) although the defendant had in fact paid 2,150 cheques into URT's account between 1999 and 2005, the plaintiff had never objected to the same. In this regard, it is to be noted that the plaintiff had only raised its objection in 2005. There is no explanation given as to why the plaintiff did not make any protest prior to 2005;
- (d) although the plaintiff opened its own current account with the defendant on 14 July 2003, cheques issued to the plaintiff continued to be paid into URT's account. In fact, there is evidence to show the plaintiff had in fact requested for its cheques to be continued to be paid into URT's account after 14 July 2003. There is again no explanation as to why the plaintiff had allowed this to happen; and (e) there is evidence which show that the proceeds from the cheques were in fact used by URT to reduce the debts owed by the plaintiff to URT. In this regard, there is no explanation as to how much of the plaintiff's debt to URT has been reduced.

F

G

H

I

- A [21] Finally, we would deal with the defendant's appeal in appeal No J-02-520 of 2006. In an application for judgment based on admission it is a principle of law that the court has power to enter judgment against a defendant based on an admission of facts made on pleadings or otherwise
- B plaintiff can obtain judgment based on an admission of facts under O 27 r 3 of the RHC. However, it is not a matter of right that a
- C such discretion is exercised depending on the circumstances of the case. See the case of *In re Wright Kirke v North* [1895] 2 Ch 747. The court will only allow judgment to be entered under O 27 r 3 of the RHC if there is an unequivocal admission of fact which entitles the plaintiff to enter judgment against the defendant. If liability turns on a question of law or mixed fact and law, judgment cannot be obtained (see the case of *Perwira Habib Bank (M) Bhd v Hj Abdullah Hj Sulaiman & Anor* [1985] CLJ 639 (Rep); [1985] 2 CLJ 489). As such, if a plaintiff cannot show that all the components of his cause
- D of action have been admitted, the plaintiff is not entitled to judgment under O 27 r 3 of the RHC. The court will not exercise its discretion to allow judgment to be entered under O 27 r 3 of the RHC if there are issues to be tried or there is a defence to the action.
- E [22] Based on the statement of claim, the plaintiff alleged that the defendant converted the remaining cheques. Alternatively, the plaintiff alleged that the defendant should refund the monies under the remaining cheques based on money had and received. We are of the view with regard to
- F the remaining cheques, the plaintiff needs to establish that the plaintiff is the true owner of the remaining cheques in order to maintain an action for conversion or money had and received (see the case of *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956).
- G [23] The plaintiff applied for judgment to be entered against the defendant based on the admission that the defendant had collected and paid the monies under the remaining cheques into URT's account. There is, however, no admission that the true owner of the remaining cheques is the plaintiff. In law, the true owner of a cheque is the person who has possession or an
- H immediate right of possession to the cheque (see the case of *United Malayan Banking Corp Bhd v Kek Tek Huat (deceased) (Kik Chon Lam & Ors, Executors of the estate of Kek Tek Huat)* [1990] 1 MLJ 83). In the present case, the plaintiff did not plead that the plaintiff is the true owner of the remaining cheques. The plaintiff did not even exhibit copies of the remaining cheques
- I in support of the O 27 application. There is no explanation in the plaintiffs affidavits that the plaintiff is the true owner of the remaining cheques. In the circumstances, the defendant's admission that the remaining cheques have been paid into URT's account is insufficient for the learned judge to enter judgment against the defendant. As stated earlier, if a plaintiff cannot show

that all the components of his cause of action have been admitted, the plaintiff is not entitled to judgment under O 27 r 3 of the RHC.

[24] We are of the view since the plaintiff's cause of action was either in conversion or money had and received, the plaintiff ought to have elected one of the causes of action at the latest before applying for judgment to be entered against the defendant. The plaintiff did not however make such an election (see the case of *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1). The election was important in determining whether the plaintiff could have obtained judgment dated 23 May 2006 based on conversion. This is because the defendant is entitled to rely on the defence of contributory negligence against the plaintiff's claim in conversion (see s 12 of the Civil Law Act 1956). On this point in the present case there is evidence to show that the plaintiff may be contributorily negligent in handling its own cheques, namely:

- (a) the plaintiff's claim involves 2,150 cheques, inclusive of the remaining cheques, that were issued to the plaintiff as payee and paid to URT for a period of six years, namely between 1999 and 2005. In this regard, the plaintiff did not make any protest until 2005; and
- (b) there is evidence to show that the plaintiff had themselves delivered some of the cheques to URT for cheques to be deposited into URT's account. In this regard, there is no satisfactory explanation as to why the plaintiff allowed this to continue although the plaintiff had opened its own current account on 14 July 2003.

[25] In the case of *Zanda Investment Ltd v Bank of America National Trust and Savings Association & Ors* [1994] 2 HKC 409, the Hong Kong High Court held that the defendant to be 100% contributorily negligent and could receive nothing on its claim against the banks. Similarly in the present case, there is a triable issue as to whether the plaintiff is entitled to the entire judgment sum or part thereof because there are facts to show that the plaintiff was contributorily negligent in the manner in which the plaintiff handled its cheques.

[26] It is our judgment if the plaintiff elected to enter judgment against the defendant for money had and received, the plaintiff must establish that the plaintiff was entitled to those monies. The plaintiff did not produce any evidence to establish that the monies under the remaining cheques belong to the plaintiff. In fact, the plaintiff did not even produce copies of the remaining cheques as exhibits for the O 27 application. For the defendant in the present case, the defendant did not admit that the monies under the remaining cheques belong to the plaintiff. In absence of this essential component of the plaintiffs cause of action, the learned judge of the High

A Court had erred in fact and in law by allowing the judgment dated 23 May 2006 to be entered against the defendant.

B [27] We also noted as claimed by the defendant that the monies collected by the plaintiff and paid over to URT were to settle debts due and owing by the plaintiff to URT. Assuming the defendant is liable, the amount should be accordingly reduced because the plaintiff's debt to URT has been accordingly reduced (see the case of *AL Underwood Ltd v Bank of Liverpool and Matins* [1924] 1 KB 775). It is therefore a triable issue as to whether the plaintiff is entitled to the entire judgment sum. If the plaintiff is not entitled to the entire judgment sum, there is a further triable issue as to what is the actual amount which the plaintiff is entitled to receive since its debts to URT have been reduced. If the learned judge had considered this issue, we are of the view that the judgment dated 23 May 2006 would not have been allowed.

D [28] We further find that it is triable issue as to whether the defendant is entitled to rely on the defence of estoppel against the plaintiff's claim in conversion or money had and received. We adopt the same reasoning as we had found in allowing the defendant's appeal in respect of the summary judgment entered against the defendant on the issue of the defence of estoppel as in appeal No J-03-90 of 2006. In short, the defendant had relied on the plaintiff's own conduct and suffered a change of position by collecting the cheques and paying the proceeds to URT between 1999 and 2005. In the circumstances, it is a triable issue as to whether the plaintiff is estopped from claiming against that defendant is liable either in conversion or for money had and received. Following the rule in the case of *Re Wright* the court should not have exercised its discretion in allowing the judgment dated 23 May 2006 to be entered against the defendant.

G [29] With regard to the remaining cheques that were crossed in accordance with s 81A of the Act, it is triable issue as to whether the defendant has a good defence under the Act. Section 85 of the Act provides a statutory defence to collecting banks in respect of claims made by true owners of cheques, whether brought in conversion or for money had and received. Section 85 of the Act relieves a collecting bank from liability provided that the bank discharges its burden in proving that the bank had acted in good faith and without negligence. In determining good faith, s 95 of the Act stipulates that a thing is deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not.

I [30] In order to establish that the defendant was not negligent, the defendant needs to establish that the defendant has taken reasonable care to refrain from taking any such step which the defendant foresees is, or ought reasonably to have foreseen was, likely to cause loss or damage to the true

owner. The fact that a cheque has been crossed in accordance with s 81A of the Act does not necessarily preclude the defendant from claiming this defence. This is clearly stated in s 85(2)(a) of the Act. In the present case, the defendant collected the cheques having knowledge of the following facts about the plaintiff and URT:

- (a) when the defendant collected cheques for URT between 1999 and 2005, URT was already an existing customer with the defendant's Taman Johor Jaya branch. URT opened its account with the defendant since 9 July 1992;
- (b) the defendant was at all times aware of the close business relationship between the plaintiff and URT and the URT's cheques paid into URT's account. The closeness of the relationship is exemplified by the fact that the plaintiff made Lim Jeng Hong, a director of URT, an authorised signatory of the plaintiff's account on 14 July 2003;
- (c) the defendant was at all times aware that pursuant to the close business relationship, the cheques issued to the plaintiff were paid into URT's account;
- (d) the defendant at all times collected cheques that were indorsed 'for the credit of United Refrigerators Trading Sdn Bhd', and some of these cheques were not even crossed 'account payee only', between 1999 and 2005. At all material times, the plaintiff did not make any protest whatsoever until 2005, that is after the relationship between the plaintiff and URT went sour in 2004; and
- (e) although the plaintiff opened its own current account on 14 July 2003, cheques issued to the plaintiff continued to pay into URT's account without any protest whatsoever from the plaintiff.

CONCLUSION

[31] For the reasons above stated, we would allow with costs all the three appeal cases. All the orders made by the learned judge of the High Court are hereby set aside. We also make an order that the defence if not filed is to be filed within 14 days from today (6 April 2007). Deposits paid by the defendant are to be refunded to the defendant.

Appeals allowed with costs.

Reported by K Nesan